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No. 93-1663

In The

Supreme Court of the United States

October Term, 1993

RANDELL P. MEANS, Assistant United States Attorney, in his individual capacity,

Petitioner,

v.

BRENDA CHILCUTT, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of the petition for a writ of certiorari. Petitioner and respondent United States[1] have consented to the filing of this brief. This motion is made necessary

[1] The United States, a defendant below, has not filed a petition for a writ of certiorari on its own behalf, and is therefore a respondent in this Court under S. Ct. Rule 12.4.

by the refusal of respondent Brenda Chilcutt's counsel to provide consent.

The National Association of Assistant United States Attorneys ("NAAUSA") is a nonprofit corporation organized under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. NAAUSA is a professional, non-governmental association with the primary objective of promoting and protecting the career and professional interests of Assistant U.S. Attorneys. Currently, NAAUSA has over 800 members with representatives in every United States Attorney's Office.

NAAUSA serves as a resource for policymakers in both the executive and legislative branches and helps to educate them with regard to important issues that concern its members. Since its incorporation in 1992 NAAUSA has become involved in a number of policy debates affecting the federal law enforcement community, including compensation and pension issues, absolute immunity protection and federal legislation dealing with crime.

The National District Attorneys Association ("NDAA") is a professional association of prosecuting attorneys headquartered in Alexandria, Virginia. NDAA currently has over 7,000 members, including prosecutors, assistant prosecutors, investigators and paralegals. NDAA provides professional guidance and support to its members, serves as a resource and education center and produces a number of publications, including *The Prosecutor* magazine.

The research arm of NDAA, the American Prosecutors Research Institute ("APRI") operates five centers: the APRI Research Center, the National Drug Prosecution Center, the National Center for Prosecution of Child Abuse, the National Environmental Crime Prosecution Center, and the National Traffic Law Center. Each center provides prosecutors with research expertise, technical assistance, and professional training seminars.

Both NAAUSA and NDAA have a strong interest in the outcome of this case. Given the controversial cases in which government counsel may often find themselves, fact-finding by appellate courts concerning alleged attorney misconduct and interference by appellate courts with the operation of government indemnification mechanisms create a unique hazard for government counsel, chilling their good faith and their energetic representation of the public interest in judicial proceedings. Though improper in itself as a matter of law, such action also unfairly offends the most rudimentary sense of fairness, for it irreparably harms a prosecutor's professional reputation without notice or providing an opportunity to present a defense. Moreover, because of their nationwide scope and participation in the judicial process, *amici* are in a unique position to aid this Court in its understanding of the increasingly systemic and recurrent character of appellate fact-finding in this context and the deleterious effect of such appellate fact-finding on both individual prosecutors and the judicial system.

Accordingly, *amici* respectfully request that their motion for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari be granted.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of the *amici* is set forth in the motion accompanying this brief.

REASONS FOR GRANTING THE PETITION

The National Association of Assistant United States Attorneys ("NAAUSA") and the National District Attorneys Association ("NDAA") support the petition for a writ of certiorari of Assistant United States Attorney

Randell P. Means and join with him to urge this Court to reverse summarily the judgment below and remand the case for further proceedings. We feel compelled to add our voices to this petition because, as petitioner has candidly observed, Pet. 17,[2] by many familiar measures this case might not be viewed as meriting the attention of the Court. Indeed, the impulse to draw such a conclusion illustrates in part the problem that makes summary reversal and remand so appropriate here. For this case presents a clear example of an increasingly recurring and egregious abuse by courts of appeals. This abuse irreparably scars the professional reputation of government counsel without notice, violates with impunity a settled rule of law governing the conduct of appellate judges and intrudes into the operation of a coequal branch of the government. By its very nature, however, this abuse is often not apparent in case reports and defies redress anywhere but in this Court.

To be sure, the abuse at issue here is not the sanctioning of a particular government attorney for his lack of diligence in timely responding to civil discovery. Rather, in affirming the district court's order barring a petitioner from seeking reimbursement of that sanction under a Department of Justice procedure, the court of appeals engaged in fact-finding that was undeniably improper, remarkably inflamed and wrong. *See* Pet. 19-22; Pet. App. 121a-133a.[3] As a result, the court of appeals erroneously branded the conduct of petitioner "patently willful and contumacious." Pet. App. 18a.

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[2] "Pet." denotes the Petition for a Writ of Certiorari.

[3] "Pet. App." denotes the Appendix to the Petition for a Writ of Certiorari.

This case involves more than merely the injustice visited upon one Assistant United States Attorney, for the Fifth Circuit has joined a number of appellate courts that are apparently willing to indulge in fact-finding when government counsel have been accused of misconduct. Such unexpected and summary treatment of so serious a matter that strikes so directly at a lawyer's professional standing has had a profound impact on government attorneys throughout the country. Yet the nature of this issue makes it one that will never appear as a conflict between the circuit courts. Precisely because the law is clear that appellate courts must not find facts, it is likely that courts that do so will either do so inadvertently or without admitting it. The subterranean nature of the problem does not make the impact any less severe, but it does mean that this Court is the only place where it can be corrected.

1. Appellate fact-finding in the context of attorney misconduct is an increasingly systemic and pernicious problem that harms and frustrates individual attorneys and corrupts the judicial process. This Court has explicitly and emphatically stated that an appellate court should not make factual findings on its own. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). As the Court explained in *Icicle*, if the court of appeals believes that a district court has failed to make findings of fact essential to a proper resolution of the legal question, it should remand the case to the district court to make those findings. If it is of the view that the findings of the district court were "clearly erroneous" within the meaning of Rule 52(a), it should set them aside on that basis. *See* Fed. R. Civ. P. 52(a). And if it believes that the district court's factual findings were unassailable, but that the

proper rule of law was misapplied to those findings, it should reverse the district court's judgment. But actually making findings of fact is not an option the law gives to an appellate court. *Id.*

An appellate court's power to find facts is so circumscribed in large measure because it does not have "the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence," *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 855 (1982), which is the "special province" of the trier of fact. *Id.* at 856. Consequently, a court of appeals "clearly err[s]" when it rejects a district court's findings merely because it would have given more weight to certain evidence than did the trial court. *Id.*

The court of appeals has plainly engaged in fact-finding in this case. After an extensive hearing on the issue, the district judge clearly stated – twice – that he was giving Mr. Means the "benefit of the doubt." Pet. App. 116a, 119a. The district court's written order also declined to decide "whether the conduct was intentional or grossly negligent." Order of July 28, 1992 in *Chilcutt v. United States*, No. 4:91-CV-277-A (N.D. Tex. July 28, 1992); Pet. App. 53a. Disregarding the district court's explicit statement and the absence of any finding of willfulness, the court of appeals went beyond the district court and found that petitioner's conduct was willful, contumacious and flagrant. Pet. App. 22a. Moreover, the court of appeals based its ultimate finding of willfulness on a confused reading of the record. *See* Pet. 19-22.

We understand that this Court does not sit merely to correct errors made by an inferior court. But the issue presented by petitioner is not unique to this case or to the Fifth Circuit. As serious as this matter is for Mr. Means, it

is part of a problem that we see becoming systemic and that has grave implications for government attorneys throughout the country and for our judicial system. Put simply, a number of courts of appeals appear to believe that it is their special province to find facts beyond those determined by the trial court in cases dealing with attorney misconduct. It is unclear whether the courts of appeals have consciously decided that it is their duty to find facts in this context, or whether this fact-finding is a result of a natural, but unconscious, temptation to reach out to address what appellate courts deem to be a lack of integrity in the system.

Whatever the reason, the blatant factual errors made by the court of appeals in this case clearly demonstrate why appellate courts are not suited to make findings of fact – there is a great risk they will get the facts wrong. Sadly, when they do get it wrong, the harm, in both human and legal terms, is irreparable.

A career as a government attorney represents a personal commitment of one's professional life to public service. Although it is a profound honor to represent the people in court, that honor is inextricably linked to a weighty responsibility, a responsibility to meet the highest standards of professional conduct at all times. For if we fall short of that standard – no matter how unintentionally – the people are not well-represented and the public interest is not well-served. This is why we do not object when one of our number falls short of this standard and is *appropriately* sanctioned.

But an inappropriate sanction, particularly one, as here, that rests on a gross mischaracterization of the government attorney's conduct, wrongly tells the world that the government attorney failed to do his or her duty

properly and represented the people dishonorably. It may cause incalculable harm to the reputation and emotional well-being of the attorney, and the attorney has little recourse to defend his or her conduct and mitigate the harm. With an inappropriate sanction, the court thus strikes directly and unjustly at the very heart of a career government attorney.

As a practical matter, it cannot be doubted that "[p]ublic criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation." Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 864 (1989) [hereinafter *Judicial Ethics*]. In contrast, labeling an attorney's conduct as contumacious or reprehensible may have little impact on the actual litigant, who may be unwilling to appeal or petition for rehearing on that basis. Indeed, because statements about the conduct of the attorney may not affect the rights of the parties, an appellate judge may feel that labeling the attorney's conduct without any similar finding by the district court is not a serious problem.[4]

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[4] In addition, fact-finding by a court of appeals reduces the analysis by the federal government of whether to appeal a case to hopeless speculation. No longer can anyone trust that all the fact-finding on which a legal conclusion might rest has been completed by the district court. Moreover, the individual government attorney must recognize the possibility that his or her professional reputation could be placed in jeopardy. The individual attorney is thus presented with a conflict between the duty to represent the client and the impulse to safeguard one's professional reputation.

Professor Kaufman cites a "good example" of a case where the appellate court "did serious injury to a lawyer's reputation in a proceeding in which he never appeared as a party." *Judicial Ethics, supra,* at 864, 866. In *United States v. Ofshe,* 817 F.2d 1508, 1516 n.6 (11th Cir.), *cert. denied,* 484 U.S. 963 (1987), the court of appeals called the prosecutor's conduct "reprehensible" and suggested that a bar disciplinary proceeding was in order. The prosecutor, Scott Turow,[5] moved to have the passage removed from the opinion. *Judicial Ethics, supra,* at 865. The motion was supported by a memorandum filed by the United States, stating that the conduct in question had been approved by the Department of Justice. H. Richard Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow,* 136 U. Pa. L. Rev. 1879, 1879-80 (1988) [hereinafter *Presumed Guilty*]. The court of appeals denied Mr. Turow's motion in an unpublished opinion. In that opinion, the court went beyond its earlier statement and found that Mr. Turow may well have obstructed justice in violation of 18 U.S.C. § 1503. *Presumed Guilty, supra,* at 1880; *Judicial Ethics, supra,* at 865. Moreover, the court expressly invited the indictment of Turow for the crime of obstruction of justice. *Presumed Guilty, supra,* at 1880. Subsequently, a one-page letter from the Public Integrity Section of the Department of Justice announced that there was no evidence that Mr. Turow violated any federal statute, and the Supreme Court of Illinois Attorney Registration and Discipline Commission informed Mr. Turow that it had dismissed its investigation. *Judicial Ethics* at

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[5] Mr. Turow has become well known as the author of numerous books, including *One L, Presumed Innocent* and *The Burden of Proof.*

865-66. Nevertheless, even after the state disciplinary authorities decided to dismiss their investigation, "[t]he only item of record [remained] the Court of Appeals' negative comment." *Id.* at 866. The unfairness of such judicial misconduct is apparent:

> [W]ithout notice, without an opportunity to be heard, and without access to a reviewing tribunal, Turow's professional reputation is impugned for lawful behavior, in accord with the policy of his office and the Department of Justice, undertaken in the interests of law enforcement. In effect, a panel of the Court of Appeals for the Eleventh Circuit sat as a grand jury, voted a true bill, and Turow, without a trial forum, will be forever presumed guilty.

Presumed Guilty at 1901.

Another case in which improper appellate fact-finding with regard to attorney misconduct has come to light in published reports is *United States v. Tarricone*, 996 F.2d 1414 (2d Cir. 1993). In *Tarricone*, the court of appeals remanded the case for an evidentiary hearing on an ineffective assistance of counsel issue. *Id.* On remand, one of the defendants claimed for the first time that the government had made knowing use of false testimony in securing his conviction. *United States v. Tarricone*, No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994). Because the case was remanded solely for consideration of the ineffective assistance claim, "the district court was not required, and indeed declined, to rule on the government's misconduct claim despite [the defendant's] arguments on this issue." *Id.* at *2. The court of appeals, however, made the finding on its own. It determined that "the only reasonable conclusion was that the . . . testimony was false and that the government knew or should have known that it was

false." *Id.* at *1. In the petition for rehearing, the government offered facts outside the record that bore on the question. The court finally admitted that the "evaluation of these facts is best left to the district court in the first instance" and expanded the scope of the remand so the district court could do so. *Id.*

It is true that an improper statement by an appeals court with regard to attorney misconduct may be corrected on remand. But correction on remand does not solve the systemic problem of appellate fact-finding. It is only because the court wrote an opinion on rehearing that we are even aware that the court had improperly found facts regarding attorney misconduct. If the court had failed to write an opinion on rehearing, the wrong would never have come to light. For example, in *United States v. Best*, 939 F.2d 425 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1243 (1992), improper appellate fact-finding came to light only after a rehearing *en banc* when the court observed in a footnote: "On this question we note that the *findings* of the original panel in this case that suggested that Assistant United States Attorney Susan Bogart, the lead prosecutor in this case, had 'quite possibly' engaged in misconduct have been vacated. Had the district court believed an inquiry into Ms. Bogart's conduct warranted, it could have conducted one; we should not perform that task in its stead." 939 F.2d at 431-32 n.3 (emphasis added). Improper fact-finding in this context is, by its very nature, a difficult problem to ferret out; but it is no less important because of this difficulty.

Petitioner's case gives this Court the opportunity to state forcefully and in no uncertain terms that the prohibition on appellate fact-finding applies in the context of attorney misconduct in the same way that it does in any

other context. Although the nature of this issue makes it difficult to discern each instance in which a court of appeals improperly has found facts, there are a sufficient number of instances of courts of appeals doing so to evidence that this is a systemic problem. Because of the serious harm that occurs when appellate courts improperly find facts regarding attorney misconduct, this Court's intervention is warranted.

2. Summary reversal and a remand of this case for further proceedings is further warranted by the important separation of powers issue created by the district court's injunction, an issue that has been made vastly more troublesome by the confusion of the facts by the court of appeals. The doctrine of separation of powers – "the heart of our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) – reflects the fact that the design of the Framers was not simply to fashion an efficient government, even in the pursuit of worthwhile goals, but to "diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Consequently, "the Court has been sensitive to its responsibility to enforce the principle when necessary." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298, 2310 (1991). Indeed, the Court has emphasized that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.' " *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley*, 424 U.S. at 123).

As part of this "diffused" design, the Constitution assigns "[t]he executive Power" to the President, U.S. Const. art. II, § 1, and charges the President to "take Care that the Laws be faithfully executed." art. II, § 3. The President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity . . . [that] include . . . management of the Executive Branch. . . . " *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). At the same time, the Constitution prohibits judges from performing "executive or administrative duties." *Buckley*, 424 U.S. at 123; *see also Muskrat v. United States*, 219 U.S. 346, 355 (1911) (Article III courts must "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution.").

The President's responsibility to supervise and manage the personnel of the Executive Branch surely is a most fundamental expression of the executive power. After all, the Executive Branch has no existence apart from the men and women who work in it; those public servants *are* the Executive Branch. *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he president alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").[6] More

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[6] Put another way, in the words of James Madison, "I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Congress* 481 (1789); *see also* The Federalist No. 72, at 487 (Hamilton) (J. Cooke ed., 1961) ("The persons . . . to whose immediate management [the government is] committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment . . . and ought to be subject to his superintendence.").

specifically, the Attorney General "is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings . . . be faithfully executed." *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). Moreover, Congress has mandated that "the Attorney General shall supervise all litigation to which the United States . . . is a party, and shall direct all United States attorneys, Assistant United States attorneys, and Special Attorneys . . . in the discharge of their respective duties." 28 U.S.C. § 519.

As part of these responsibilities, in 1986 the Attorney General changed the policy of the Department of Justice to allow the Department to reimburse Department employees against whom sanctions are entered as a result of acts taken within the scope of their employment, when the Attorney General determines that such reimbursement is in the interests of the United States. 28 C.F.R. § 50.15(c). The Attorney General gave several reasons for this indemnification mechanism.

First, the Attorney General pointed out that in "most state and local governments and general corporate practice" employees are indemnified if they suffer an adverse monetary award as a result of actions taken in carrying out their duties. 51 Fed. Reg. 27,021, 27,022 (1986). Of concern, to be sure, were the "detrimental consequences [of a monetary award] for the federal employee, both pecuniary and otherwise." *Id.*

But the Attorney General went on to explain that, more importantly, this step was taken in the public interest to remove "a major impediment to the effective conduct of the public's business and enforcement of the law." *Id.*

> Of greater consequence to the federal government . . . is the fear of personal liability, because it is this concern which affects governmental operations, decision making, and policy determinations. The prospect of personal liability, and even the uncertainty as to what conduct may result in a lawsuit against the employee personally, tend to intimidate all employees, impede creativity and stifle initiative and decisive action. As Professor Kenneth Culp Davis has noted, "The public suffers whenever a government employee resolves doubts in order to protect his own pocketbook instead of resolving doubts in order to protect the public interest."

Id. (quoting K. Davis, *Constitutional Torts* 25 (1984)).

By its order permanently enjoining petitioner from applying under this policy for reimbursement of the discovery costs awarded against him, the district court intruded into the internal operations of the Executive Branch and in effect usurped the Attorney General's authority to determine whether indemnification of petitioner was in the interests of the United States.

Yet, in fairness, this obvious violation of the separation of powers by the injunction cannot be characterized so starkly. Petitioner was sanctioned in this manner under the express terms of Fed. R. Civ. P. 37(d), pursuant to which counsel for a litigant may be required to pay the reasonable expenses of an opponent caused by that litigant's failure to respond to discovery. Moreover, "[t]he ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987); *see also*

Fed. R. Civ. P. 11(c) (sanctions may be imposed on the attorneys of litigants).

Thus, two important values in the law, significant and legitimate interests of two coequal branches of the government, are put at loggerheads by the injunction at issue here. This Court has not addressed a conflict of the kind posed by this case.

We believe, however, that established principles of law lead inexorably to the conclusion that such an injunction is a violation of the constitutional separation of powers and is thus beyond the power of the judiciary. The United States is not, after all, just any litigant but part of the Executive Branch of the federal government and is thus of equal stature with the judiciary. The fact that distinct rules might govern the power of a court to sanction the government or its counsel is hardly a radical proposition in our constitutional order. Indeed, it must be remembered that the inability of a court to issue such an injunction does not in any way disable a court from ordering monetary sanctions, and thereby vindicating the judicial interests at stake. The Attorney General's indemnification policy is obviously not designed to permit an individual attorney who fails to live up to the high standards of professional conduct expected of government counsel to escape the consequences of his or her behavior. Even if ultimately indemnified, being the subject of such a sanction is no minor matter and does have a profound effect on the attorney involved.

Moreover, the supervisory power of a court to punish misconduct in the context of judicial proceedings has never been unfettered. Even the imposition of a sanction for criminal contempt is constrained by the rule that

"only 'the least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)). Different procedures must be followed to punish out-of-court, as opposed to in-court, contempts. *Young*, 481 U.S. at 798-99; *see also Bloom v. Illinois*, 391 U.S. 194, 202-08 (1968) (reviewing constitutional and other limitations on the judicial contempt power); Fed. R. Crim. P. 42 (The prosecution of contempt occurring out of the presence of the court may proceed only on notice, with a reasonable time for the preparation of the defense, and subject to other procedures.).

The doctrine of separation of powers is indisputably another restraint on the court's supervisory power:

> The judiciary does not "have a license to intrude into the authority, powers and functions of the [executive] branch[][,][for] [j]udges are not . . . executive officers, vested with discretion over law enforcement policy and decisions. . . . [T]he supervisory power . . . empower[s] judges to formulate procedural rules not specifically contemplated by Congress or the Constitution, [but] it does not justify a chancellor's foot veto over activities of coequal branches of government."

United States v. Jennings, 960 F.2d 1488, 1491 (9th Cir. 1992) (quoting *United States v. Simpson*, 927 F.2d 1088, 1089 (9th Cir. 1991)).

This view of the constraint imposed by the separation of powers reflects neither a simplistic nor an absolutist view of that doctrine. Rather, it follows from this Court's repeated caution that the separation of powers does not mandate "a hermetic division between the Branches." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). No

Branch is completely unfettered in any sphere of action. For example, the "Executive . . . cannot perform its function of enforcing the laws if Congress declines to appropriate the necessary funds for that purpose; or if the courts decline to entertain its valid prosecutions." *Young*, 481 U.S. at 817 (Scalia, J., concurring in the judgment). Likewise, the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.* at 818 (quoting The Federalist No. 78, at 522-23 (Hamilton) (J. Cooke ed., 1961)). Thus, the notion that a court simply cannot enjoin indemnification of a sanctioned government attorney fits comfortably within the established edifice of separation of powers law.

It is possible that the ultimate resolution by this Court of the conflicting interests underlying this important separation of powers issue may fall short of a complete bar to such an injunction. Petitioner here, for example, has suggested that separation of powers concerns might limit such an intrusion into Executive Branch operations when "willful misbehavior" is not involved. Pet. at 16 (citing *Blue v. Department of the Army*, 914 F.2d 525, 549 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991)).[7]

If such a position is to be considered fairly by this Court, however, the record that presents the issue to the Court must offer an accurate characterization of the sanctioned conduct. The error of the court of appeals in its *de novo* factual findings has, at the very least, deprived this Court of such a clear record. As petitioner has described

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[7] For example, Section 17 of the New York Public Officers Law obliges the State of New York to indemnify its public employees for actions taken within the scope of their employment but not for intentional wrongdoing. N.Y. Pub. Off. Law § 17(3)(a) (McKinney 1988 & Supp. 1992).

in detail, Pet. at 18-24, the district court did not find that willful misconduct was involved here, no one had argued that petitioner had acted willfully, and the record does not in fact support a conclusion that petitioner acted willfully. Yet the court of appeals – not surprisingly, given the inherent institutional limitations on its ability to find facts accurately – confused the evidence and mistakenly concluded that the conduct at issue was willful. Pet. App. 1a. As a result, even the court of appeals' fairly limited discussion of the separation of powers concerns at stake is premised on the mistaken idea that it was vindicating the courts' "deeply rooted . . . authority to enforce their orders and punish *willful* infractions thereupon. . . . " *Id.* at 1327 n.38 (emphasis added). Summary reversal and a remand to the court of appeals will allow the courts below to address the separation of powers issue squarely and possibly eliminate it. Regardless, a more careful characterization of the facts will build the kind of clear record such a significant matter requires. *See* Pet. at 23 n.14.

3. Although appellate fact finding occurs in other contexts,[8] fact finding concerning attorney misconduct is

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[8] *See, e.g., Murphy v. FDIC*, 12 F.3d 1485, 1498 n.7 (9th Cir. 1993) (Norris, J., dissenting); *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 477-78 (4th Cir. 1992) (Widener, J., dissenting), *cert. denied*, 113 S. Ct. 1625 (1993); *Clarke v. Frank*, 960 F.2d 1146, 1154-56 (2d Cir. 1992) (Meskill, J., dissenting); *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 283 (6th Cir. 1991) (Gary, J., concurring in result), *cert. denied*, 112 S. Ct. 1497 (1992); *St. Paul Fire & Marine Ins. Co. v. Lewis*, 935 F.2d 1428, 1434-39 (3d Cir. 1991) (Garth, J., dissenting); *Brown v. Board of Educ.*, 892 F.2d 851, 890 (10th Cir. 1989) (Baldock, J., dissenting).

especially problematic. As pointed out above, although the issue has grave implications, it is not an issue that will emerge as a conflict in the circuits. It is a problem that lurks below the surface of many opinions, but may not often come to light. Appellate courts rarely admit they are going beyond the record, and often the district court opinion is not published or even available through computer services. In addition, because the attorney who has been maligned is not the actual litigant, there may be no reason to petition for rehearing or appeal further. The actual litigant may be pleased with the outcome despite the fact that the attorney was wrongly castigated. Moreover, an attorney who has already been wrongly cast in a bad light by an appeals court is often hesitant to ask a court to correct the error for fear that the error may be compounded, as it was for Mr. Turow. *Cf. Presumed Guilty, supra,* at 1901 ("Instructed by experience, [Turow] will surely not petition the same court" for further relief in the wake of favorable outcome of the bar disciplinary proceedings.).

Summary reversal is particularly appropriate here, because in this petition this Court has before it a case where the issue is cleanly presented. There is no question but that the court of appeals improperly found facts and misstated the record.[9] If the Court waits for another

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[9] The court of appeals' ruling on petitioner's intent is a factual finding, and the court of appeals did so impermissibly, without even alluding to the clearly erroneous standard of Fed. R. Civ. P. 52(a). *See United States v. Yellow Cab Co.*, 338 U.S. 338 (1949) ("Findings as the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those that see and hear them."); *Rogers v. Lodge*, 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982) (noting that issues of intent are

vehicle to address this issue, the Court may be faced with the additional issue of whether the court of appeals was actually finding facts. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 288-89 (1982) (noting difficulty in distinguishing questions of fact from questions of law).

We understand that summary reversal is not the usual disposition for a petition before this Court. Nonetheless, this Court has done so when it believes a decision below to have been wrong. *See, e.g., Board of Educ. of Rogers v. McCluskey*, 458 U.S. 1132 (1982) (reversing court of appeals for plain error when it replaced school board's construction of its rule with the "court's own notions under the facts of the case"); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (single expletive by petitioner in courtroom during trial did not justify use of contempt power). This case goes beyond the terrible wrong done to Randell Means, a wrong which may be reason enough to reverse summarily, even if it involves only a misapplication of settled law to the facts of this particular case. *See, e.g., Dillingham v. United States*, 423 U.S. 64 (1975) (summarily reversing because of the Fifth Circuit's "incorrect reading" of *United States v. Marion*, 404 U.S. 307 (1971)). Reversing the court of appeals in this case, however, will do more than remedy the injustice to the individual litigant in this case. It will also notify courts of appeal that they may not indulge in this abuse of the judicial process.

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commonly treated as factual matters for purposes of the clearly erroneous standard of Fed. R. Civ. P. 52).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, the National Association of Assistant United States Attorneys and the National District Attorneys Association respectfully submits that the petition should be summarily reversed.

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